Docket No: 04-0371
Bench Date: 9/9/04
Deadline: 9/9/04

M E M O R A N D U M

TO: The Commission

FROM: David Gilbert, Administrative Law Judge

DATE: September 7, 2004

SUBJECT: XO Illinois, Inc.

Petition for Arbitration of an Amendment to an Interconnection Agreement with Illinois Bell Telephone Company Pursuant to Section 252(b) of the Communications Act of 1934, as Amended.

RECOMMENDATION: Take one of the three actions discussed below (enter attached Arbitration Decision, postpone action or decline to take action).

This is an arbitration under federal Telecommunications Act of 1996 ("Federal Act") between XO Illinois, Inc., ("XO"), and Illinois Bell Telephone Company d/b/a SBC Illinois ("SBC"). Its sole purpose is to incorporate provisions in the FCC's Triennial Review Order ("TRO") into the parties existing interconnection agreement ("ICA").

This case was before you on August 31, 2004 for discussion only. At that time, I presented a proposed Arbitration Decision, which I advised you would be significantly affected by the FCC's *Status Quo* Order[1] released on August 20. I further advised you that the parties would file two rounds of supplemental briefs, analyzing the *Status Quo* Order and its impact here. Those briefings were completed on September 3, 2004.

The Decision attached to this memorandum is a revised version of the previous proposed Decision. It reflects the parties' supplemental briefings and my own analysis regarding the contents and requirements of the *Status Quo* Order. Because you are receiving this case for vote two days before the deadline, please note that there are three actions available to you.

First, you can promptly consider - as well as approve and enter - the attached Decision. As would be expected, I believe that it appropriately incorporates the *Status*

[1] In both this memorandum and the attached Decision, "*Status Quo* Order" is used to avoid confusion with another, frequently-cited FCC order known as the "Interim Order."

Quo Order (as well as the other orders, statutes, regulations and policies that originally governed this proceeding).

Second, you can delay consideration until you have had more time to analyze the Decision. By doing so, however, you would take this proceeding beyond the time limit set forth in Section 252 of the Federal Act for "conclud[ing] the resolution of any unresolved issues" presented by the parties. When that occurs, the same statute provides that the FCC "shall issue an order preempting the State commission's jurisdiction of that proceeding…within 90 days after being notified (or taking notice) of" the missed deadline. The FCC would then "assume the responsibility" of this Commission. A key practical question is whether the Commission believes that a party here would turn to the FCC rather than waiting a reasonable time for a Commission decision.

Third, you can take no action. The same statutory provision discussed above would apply. One practical question is whether one or both of the arbitrating parties would send notice to the FCC or, instead, start new negotiations in the altered regulatory environment created by the *Status Quo* Order (or even cease their dispute pending formulation of the FCC's permanent rules). Another practical question is what the FCC would do – and what the parties might rationally *expect* the FCC to do - with a case arising from the partly vacated and partly superceded TRO, particularly when the FCC intends to issue permanent rules in six months. On the other hand, please be fully advised that each of the arbitrating parties has expressly stated that it wants this Commission to render a Decision here that addresses the parties' substantive interpretations of the TRO and requires them to amend their ICA accordingly. There are several FCC rulings in the TRO that were neither reversed by the Court of Appeals nor superseded by the *Status Quo* Order. Thus, while the Commission can decline to take action for practical or policy reasons, there are substantive issues ready for resolution.

Certain comments may be useful as you consider the foregoing options. As I noted above, the purpose of this arbitration is to incorporate the TRO into the parties' ICA. The TRO addressed the duty of incumbent local carriers to provide unbundled network elements ("UNEs"). Portions of the TRO were vacated by the U.S. Court of Appeals. Those portions concerned important UNEs - local mass market switching, dedicated transport and enterprise market loops. Consequently, the parties raised and argued their issues with the understanding that the aforementioned UNEs were not available to XO. However, the *Status Quo* Order has restored the unbundling obligation associated with those UNEs (for an interim period). That means that the overall context - and many significant specific elements - of this case were dramatically altered after the parties submitted briefs, the proposed Decision was circulated and exceptions were posed. Although the parties provided supplemental briefs, those filings were, in my view, cursory (perhaps because of the limited time available).

The most provocative supplemental brief was Staff's. Staff aptly observed that the dividing line between matters that were *certainly* affected by the Status Quo Order, and those that were *arguably* affected, is unclear. Indeed, from a broad view, the

Status Quo Order touches upon many more issues in this arbitration than the few addressed by the arbitrating parties in their supplemental briefs. Perhaps the arbitrating parties simply do not share that broad view. Or, their silence could reflect the tacit decision to "waive" certain arguments, in order to complete this proceeding and move toward an ICA. In any event, without more input from the parties, and because of the compressed time for analysis, I did not, for the most part, broadly revise the Decision here.

Additionally, please note that the *Status Quo* Order becomes effective upon publication in the Federal Register, which has not yet occurred. Commissioner Wright and others have suggested that publication will take place by September 9, the deadline date for this case. If so, the applicability of the *Status Quo* Order to the present case is clear. However, if publication occurs thereafter, but the attached Decision is entered on September 9, it could be asserted that the Decision applied ineffective law. That should not matter, though, if publication occurs after you enter a Decision in this case but *before* you issue a final order regarding the amended ICA that the parties must submit for your approval[2]. In such case, the *Status Quo* Order would have taken effect prior to the effective date of the ICA amendment. Publication is a virtual certainty before you vote on the amended ICA (unless the Court of Appeals overrides the *Status Quo* Order, as the ILECs have requested). Nonetheless, the Commission does have the option of awaiting publication of the *Status Quo* Order before acting in this case.

In sum, I recommend that the Commission take one of the three actions (enter the attached Decision, postpone action, decline to take action) discussed above.

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The following is a portion of my memorandum of August 26, 2004, which accompanied the previous version of my proposed Arbitration Decision. It is repeated here to provide additional context for decision-making.

Between them, the arbitrating parties presented 35 numbered issues and sub-issues, and reframed each other's issues to create additional issues 12 times. Several issues were presented as "topics" (in contravention of the Federal Act) rather than framed as disputes. Also, there were myriad contentious provisions in each party's densely worded proposed contract. As a result, the actual points of disagreement between the parties numbered in the hundreds. Accordingly, the decisions in the attached Arbitration Decision are simply too numerous to address in this memorandum.

The history of this case can by summarized here, however. According to the record here, after the FCC issued its TRO, the parties exchanged correspondence about revising their existing ICA to incorporate applicable TRO rulings (as the FCC required). That correspondence discussed the arbitration provisions of Section 252 of

[2] That submission would come before you in a separate docket.

the Federal Act. Nevertheless, despite XO's requests, the parties conducted no face-to-face negotiations, although contract terms were exchanged.

As previously described, in March 2004, in USTA II, the U.S. Court of Appeals vacated and remanded portions of the TRO, but temporarily stayed the effect of its order.

XO petitioned this Commission for arbitration in May 2003. SBC objected to the petition, arguing that disputes about the impact of the TRO on the parties' ICA should be addressed in a different (unidentified) type of proceeding, rather than through arbitration. I denied that objection, and the parties waived evidentiary hearings.

As noted above, the USTA II decision, overturning parts of the TRO, became effective on June 16, 2004. On June 23, this Commission reopened Docket 01-0614 to consider the impact of the TRO and USTA II on prior Commission rulings implementing Section 13-801 of the Illinois Public Utility Act.

On June 28, XO moved to withdraw its arbitration request and terminate this proceeding, asserting that the "state of flux and rapid change" in the regulatory landscape precluded rationale decision-making. Despite its earlier contention that the Commission lacked jurisdiction to conduct this arbitration, SBC opposed that motion. In a conference call with all parties, I presented the preliminary view that the Federal Act permitted XO to withdraw its own issues, but would not permit the Commission to dismiss SBC's issues without SBC's consent. XO then waived a formal ruling and, on July 13, moved to withdraw its motion. The parties then filed initial and reply briefs, I issued a proposed Arbitration Decision and the parties filed exceptions.

The FCC's *Status Quo* Order followed. It was not a surprise. The FCC had indicated that interim rules were in the offing. It had also indicated (and reaffirmed in emphatic language in the Interim Order) that permanent rules would follow by year's end. That means that the ICA that results from the instant arbitration will likely need renegotiation at that time. In view of all the uncertainty described here, had I believed that the Federal Act permitted it, I would have granted XO's motion to terminate this arbitration, despite SBC's opposition. Instead, the case has continued on, using the resources of this Commission, to produce an amendment to the parties' ICA that will determine their respective obligations for a limited time only.